No. 79-16

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL A. CODUTO AND RUDOLPH PERISICH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1979. A petition for rehearing was denied on June 5, 1979. The petition for a writ of certiorari was filed on July 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge committed reversible error in refusing to give petitioners' requested instructions on the applicable statute of limitations.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to commit extortion while acting under color of office as elected officials of the City of Countryside, Illinois, in violation of 18 U.S.C. 1951. Petitioners were each sentenced to three years' imprisonment and a $10,000 fine.

The evidence at trial established that from June 1966 until April 27, 1972, petitioners conspired to extort money from owners of a general contracting company, Pletka and Associates, by requiring representatives of Pletka to make cash pay-offs to petitioners in return for approval of applications for building permits issued by the City of Countryside. Petitioner Coduto was mayor of Countryside from June until the time of trial (Pet. App. 2; Tr. 41). Petitioner Perisich was a Countryside alderman from 1963 until the time of trial and from 1966 to 1972 was the chairman of the building committee, which was responsible for making recommendations to the full City Council as to whether specific building permits should be approved or disapproved (Tr. 42, 147-150, 158).

In the summer of 1966, Pletka and Associates had contracts to build a number of buildings in an area of Countryside known as Dansher Industrial Park, owned by Dansher Corporation (Tr. 399, 698-701). When it became apparent that pending applications to build in Dansher Industrial Park had not been approved by the City of Countryside for some time, Ed Baker, a representative of Dansher Corporation, arranged a meeting between George Houdek, an employee of Pletka and Associates, and petitioner Coduto (Tr. 450-452).

At this meeting, petitioner Coduto informed Houdek that some "compensation" should be paid for arranging

City Council approval of building permits. Houdek suggested 1% of the construction cost of each particular building (Tr. 454-456). This arrangement was later accepted by both petitioners, and by Ed Baker and Vaclav Pletka, the owner of Pletka and Associates, at a meeting on October 25, 1966 (Tr. 790-793).

Thereafter, from October 1966 until April 12, 1972, for Pletka made cash payments to either Coduto or Perisich for every building permit issued to Pletka and Associates for buildings in Dansher Industrial Park. Pletka generated the cash for these pay-offs by causing a Pletka and Associates check to be made out to cash, himself, or an employee, and then having the check cashed. For each building in Dansher Park, Pletka and Associates issued two checks in the same or close to the same amount—one for the lawful fee to obtain the building permit and one for the "compensation." After obtaining the pay-off cash, Pletka would then hand deliver the money to either Coduto or Perisich at various locations (Tr. 807-947).

On April 11, 1972, Pletka received a letter from Al Mitchell, the Countryside building commissioner, informing him that the plans for one of the Dansher buildings could not be approved in their present form (Tr. 921-922). Pletka called petitioner Perisich and told him he had to get approval to begin construction. Petitioner Perisich later called back and told Pletka he would have to pay $1,000 over the ordinary 1% pay-off (Tr. 922-927). They arranged to meet the next morning so that Pletka could deliver $7,200 in cash to Perisich (Tr. 928).

On April 12, 1972, Pletka delivered the cash to petitioner Perisich (Tr. 930-931). Later that day, Perisich informed the Council of the permit request and moved to

issue the permit (Tr. 66, Gov't Exh. 2-9).[1] On April 27, 1972, the permit was issued by the City Clerk.

Petitioners were indicted on April 11, 1977 (Pet. App. 4). They were convicted and the court of appeals affirmed (Pet. App. 1-11).

ARGUMENT

Petitioners contend the district court committed reversible error when it refused to give the following instruction (quoted in part, Pet. App. 3):

> The statutes [*sic*] of limitations for the offense charged in the indictment is five years. This means that you cannot find the defendants guilty unless you find beyond a reasonable doubt that a conspiracy continued or existed within the period begining April 12, 1972 and ending April 27, 1972.

The trial judge refused to give this charge on the ground that it was confusing and that whether the statute of limitations applied was a question of law for the court, not the jury (C.C. Tr. 88-90, 94-99).[2] The court, however, twice offered to submit a special interrogatory to the jury to find the facts relevant to the statute of limitations issue (C.C. Tr. 89, 98). The special interrogatory, the court stated, would permit the jury to make findings as to when the conspiracy ended, and it would permit the court to rule on whether that prosecution was barred by the statute of limitations as a matter of law (C.C. Tr. 98). Petitioners did not offer a modified instruction, nor did

[1]Gov't Exh. 2-9 is the minutes of the City Council of Countryside for April 12, 1972.

[2]"C.C. Tr. " refers to the charge conference transcript of April 10, 1978.

they accept the court's offer to submit a special interrogatory to the jury on the statute of limitations issue (Pet. App. 6).

The court of appeals affirmed. It held that the district court erred in concluding that the applicability of the statute of limitations was not a question for the jury but that the error did not require reversal because the instructions offered by petitioners were inaccurate and potentially misleading, because the district court offered to submit the factual issues to the jury, and because there was abundant evidence that the offense charged fell within the limitations period. That conclusion was correct and presents no issue warranting this Court's review.

First, as the court of appeals noted (Pet. App. 5), petitioners' proposed instruction was factually inaccurate in one significant respect. As petitioners now concede (Pet. 7 n.*), the proposed instruction miscalculated the statute of limitations period. The instruction would have required the jury to find that the conspiracy existed on or after April 12, 1972, while the statute of limitations period included April 11, 1972, as well. The one-day difference is significant because it was on April 11, 1972, that several critical acts in the conspiracy occurred. On that day, after Pletka received a letter informing him that his plans for one of the Dansher buildings could not be approved, he called petitioner Perisich to request approval. Perisich then called Pletka back and demanded an additional $1,000 above the usual pay-off, and the two arranged to meet the next day to make the payment. Under petitioners' proposed instruction, the jury could not have considered any of this evidence as indicating that the conspiracy "continued or existed" within the limitations period.

Beyond this important defect, petitioner's proposed instruction was, as the district court and court of appeals both found (Pet. App. 6), likely to confuse the jury. Petitioners' proferred instruction could have been interpreted to require the jury to find that petitioners were parties to a conspiracy that lasted until April 27, 1972. This would have been a more favorable instruction than that to which petitioners were entitled, because they were properly liable for participation in one conspiracy on any date on or after April 11, 1972, and did not necessarily have to be members until April 27, 1972.

Moreover, the proposed instruction did not make clear that the proof of continuation of the conspiracy into the limitations period would not have to depend on proof of specific conduct within the limitations period by each member of the conspiracy in furtherance of its objects, assuming that specific conduct within the limitations period had to be proved at all. See note 3, *infra*. For example, if the jury concluded that a conspiracy existed between petitioner Coduto and Perisich, it would be sufficient that some of the objects of the conspiracy were still being pursued by at least one of them during the limitations period, so long as the other had not withdrawn from the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640 (1946); *United States* v. *Nowak*, 448 F. 2d 134, 139-140 (7th Cir. 1971). Yet under petitioners' proposed instruction, the jury could well have concluded that because only Perisich engaged actively in conduct in furtherance of the conspiracy during the limitations period, the conspiracy did not "continue[] or exist[ ]" during that time.[3]

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[3]The court of appeals also suggested (Pet. App. 6) that petitioners' proposed instruction was legally erroneous because it did not explain that the government had to prove that at least one overt act fell within the limitations period. Petitioners argue (Pet. 7) that the court of appeals was wrong in this respect because conspiracies in violation of the Hobbs Act, 18 U.S.C. 1951, do not require proof of an overt act. See *Ladner* v. *United States*, 168 F. 2d 771 (5th Cir.), cert. denied, 335 U.S. 827 (1948); *United States* v. *Callanan*, 173 F. Supp. 98, 101 (E.D. Mo. 1959), aff'd, 274 F. 2d 601 (8th Cir. 1960), aff'd, 364 U.S. 587 (1961); *United States* v. *Tolub*, 187 F. Supp. 705, 709 (S.D.N.Y. 1960), aff'd, 309 F. 2d 286 (2d Cir. 1962). Even if the court of appeals was wrong in this respect, petitioners should not be heard to complain about the rejection of their proposed instruction on the ground that it was too favorable to the government. Moreover, the court of appeals' view on this issue, even if incorrect, does not undermine the correctness of its conclusion that the proposed instructions were inaccurate and confusing in other respects.

In view of the facts that petitioners' proposed instructions were inaccurate and potentially confusing and that petitioners did not offer any modified or correct instructions, the court of appeals properly held (Pet. App. 7) that the failure of the district court to give a correct statute of limitations instruction would require reversal only if it constituted a "plain error or a defect affecting substantial rights." *United States* v. *Park*, 421 U.S. 658, 676 (1975); see also Fed. R. Crim. P. 52(b). There was no such error in this case. As the court of appeals noted (Pet. App. 6), the district court offered to present the statute of limitations issue to the jury, by means of a special interrogatory requesting the jury to make findings of fact bearing on that issue. Petitioners do not argue that this way of presenting the issue to the jury would have been improper or would have prejudiced them.[4] They

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[4]As is pointed out in Devitt & Blackmar, *Federal Jury Practice and Instructions*, §6.09, at 195 (3d ed. 1977), special interrogatories are often and properly used in connection with statute of limitations questions. Although a request for special findings by a jury is generally disfavored in criminal cases, *United States* v. *Spock*, 416 F. 2d 165, 180-183 (1st Cir. 1969), this device has been used in special circumstances where it may be of benefit to the defendant—in order, for example, to determine the duration of a particular defendant's participation in a conspiracy (*id.* at 182 n.41), and cases cited). See, *e.g.*, *United States* v. *Sobell*, 314 F. 2d 314, 329 & n.12 (2d Cir.), cert. denied, 374 U.S. 857 (1963).

nevertheless failed to respond to the court's invitation or to proffer a modified instruction that was less likely to confuse the jury, and thus should not be heard now to complain that the statute of limitations issue was never presented for the jury's consideration. Moreover, there was abundant evidence that the conspiracy continued within the limitations period, and the court of appeals thus correctly concluded (Pet. App. 7) that "the failure of the Court to give an instruction on the statute of limitations was [not] so 'highly prejudicial' as to constitute plain error."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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